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In the Supreme Court of the United States

OCTOBER TERM, 1975

WILLIAM W. GRUBB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that (1) the jury was improperly instructed on the issue of entrapment; (2) the prosecutor impermissibly asked petitioner if he had ever told his exculpatory version of the case to anyone prior to trial; (3) certain chemist's reports were improperly admitted into evidence; and (4) it was plain error for the district court not to instruct the jury that its verdict must be unanimous.

Following a jury trial in the United States District Court for the Eastern District of Illinois, petitioner and co-defendant Michael F. Woods were convicted of possessing, with intent to distribute, hashish (count 1), marijuana (count 2), and amphetamines (count 3), in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Pet. App. A-1 to A-2, A-4). Petitioner was sentenced on count 1 to six months' imprisonment to be followed by two-and-one-half years' probation, and fined $1,000. On counts

2 and 3 he was sentenced to concurrent terms of three years' probation, to run consecutively to the sentence imposed on count 1. The court of appeals affirmed (Pet. App. B).

At trial, the government showed that petitioner engaged in a drug transaction with an undercover agent of the Drug Enforcement Administration ("DEA") and agreed to further such transactions (Tr. 10-46). Both petitioner and his daughter testified on his behalf. Their story was that the drugs involved had originated with the government informant who introduced petitioner to the DEA agent involved in the transaction for which petitioner was arrested and convicted. They testified that the informant had asked Ms. Grubb's boyfriend to hold the drugs temporarily, and that Ms. Grubb in turn had agreed to hold the drugs herself. Petitioner allegedly discovered the drugs in her bedroom and ordered her to dispose of them. Petitioner testified that when the DEA agent and co-defendant Woods arrived at his house on the evening of petitioner's arrest, petitioner assumed that they were there to pick up the drugs he had discovered in his daughter's room. Petitioner denied discussing future sales of the drugs with the undercover agent (Tr. 250-275).

1. Petitioner claims that the district court should have instructed the jury to acquit unless they found that the government informant did not supply the narcotics.

In *Hampton* v. *United States,* No. 74-5822, certiorari granted March 31, 1975, the issue is whether the government may constitutionally convict a defendant for selling contraband that he procured from a government agent or informant. There is no need to hold the instant petition pending the outcome of that case, however, since regardless of how *Hampton* is decided, the court of appeals was correct in holding that on the facts of this case the requested instruction would have been improper.

Assuming that the narcotics involved in this case originated with the government informant, the defense evidence itself showed that the narcotics did not pass directly from the informant to petitioner but, rather, through a series of unforeseen transfers, from the informant via an agreement with petitioner's daughter's boyfriend to petitioner's daughter, and finally to petitioner himself. There is no evidence to indicate that the government informant intended or even suspected that the narcotics he asked petitioner's daughter's boyfriend to hold would end up in petitioner's hands. In these circumstances the rationale of *United States v. Bueno,* 447 F. 2d 903 (C.A. 5), upon which petitioner principally relies, does not apply, as the Fifth Circuit itself has held in *United States* v. *Rodriguez,* 474 F.2d 587, 589:

> *Bueno* will not support the theory that the introduction of narcotics into the marketplace by the Government informer is sufficient to cloak all subsequent sellers with an entrapment defense. Being once removed from the person to whom the the cocaine was furnished by a Government informer. Rodriguez cannot claim entrapment as a matter of law. He obtained the contraband from a non-government source, and that fact alone is sufficient to distinguish his defense from Bueno's.

Accordingly, under any version of the entrapment defense or the related due process defense, the district court here properly refused to give the instruction requested by petitioner, and the issue does not merit further review.

2. Petitioner claims next that his conviction should be reversed because the prosecutor asked him on cross-examination whether he had ever told his exculpatory version of the events at issue to anyone prior to trial.

Petitioner's objection to this line of questioning was sustained, petitioner did not respond to the inquiry,[1] and the prosecutor did not mention the issue again, either in further cross-examination or in closing argument.

This case is distinguishable from *United States* v. *Hale*, No. 74-364, decided June 23, 1975, where this Court held, in the exercise of its supervisory powers, that it was error for the district court to allow cross-examination of the defendant concerning his silence during police interrogation at the time of his arrest. In *Hale* the defendant actually admitted, in response to the prosecutor's question, that he had not previously related his exculpatory version of events to the police. Here, in contrast, petitioner's objection to the prosecutor's inquiry was sustained prior to any response by petitioner, and, as the court of appeals ruled (Pet. App. A-4 to A-5), it cannot be said that the mere inquiry necessarily led the jury to believe that petitioner had relied on his Fifth Amendment privilege against self-incrimination at the time of his arrest. Similarly, the inquiry alone would not necessarily have caused the jury to believe either that petitioner had not, at some previous point, told his exculpatory story or, if he had not,

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[1]The relevant colloquy was as follows (Tr. 285-286):

Q. Did you ever upon your arrest or any other time tell the police, at the preliminary hearing or anywhere else to anybody except to your lawyer, about how you came in contact with these drugs?

A. How I came in contact with these drugs?

Q. Yes, You are telling this Jury that you innocently came into contact with them. Did you ever tell that to the people that arrested you, to the Champaign Police, to the magistrate, to the United States Attorney's office, to anybody?

At this point petitioner objected, and his objection was sustained.

that his reasons for not doing so cast doubt upon the veracity of his trial testimony.[2]

Furthermore, petitioner did not move for a mistrial or even request a curative instruction in regard to the prosecutor's question. Since petitioner was content with the sustaining of his objection and chose not to present this issue (of prejudice inherent in the question itself) to the district court, which was in the best position to judge what impact, if any, the prosecutor's inquiry might have had, and what response might have been appropriate, petitioner must be held to have waived the point absent plain error. We submit that the inquiry by the prosecutor, standing alone, was not so prejudicial that it could not have been cured by an instruction to the jury to disregard it. Accordingly, there was no plain error, and further review by this Court is unwarranted.[3]

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[2]*Hale* is also distinguishable on the ground that the prosecutor's inquiry in this case did not emphasize petitioner's silence in the face of police questioning at the time of arrest, but inquired equally into his refusal to tell any government official of his exculpatory version at any other time prior to trial, when "the inherent pressures" faced by an arrestee at "the time of arrest and during custodial interrogation" (*Hale, supra,* slip op. 5, 6) would not have existed. In our view, a defendant's failure to present his version of events during these times prior to trial, and his reasons for keeping silent, are not so inherently unreliable that they should not be presented to the jury for whatever evidentiary value the jury may choose to assign them.

[3]The fact that petitioner did not respond to the prosecutor's inquiry also distinguishes this case from *Doyle* v. *Ohio*, No. 75-5014, and *Wood* v. *Ohio*, No. 75-5015, certiorari granted October 6, 1975, in which this Court has agreed to decide *Hale*-type issues arising in the context of state criminal proceedings. In both those cases the prosecutor apparently succeeded in eliciting from the defendant that he had never previously related his exculpatory version of events (Pet. No. 75-5014, at 11-12; Pet. No. 75-5015, at 12). Moreover, the prosecutor also argued in summation that the jury was free to draw inferences unfavorable to the defendant from his failure to tell his story before trial. Given these factual distinctions, there is no need for this Court to hold the instant case pending disposition of *Doyle* and *Wood*.

3. Petitioner claims that the forensic chemist's written analyses of the narcotics seized from petitioner should not have been introduced in evidence because at the top of each of the three reports there appeared a brief summary by the arresting officer of the circumstances of the seizure.[4] As the court of appeals noted, however (Pet. App. A-7 to A-8), petitioner had acknowledged by his entrapment defense the facts surrounding his arrest and the seizure of the narcotics, and therefore the admission of the reports was not prejudicial to him in any way. That the admission of the reports was not error was adequately explained by the court of appeals (*id.* at A-8 to A-9), upon whose opinion we rely:

> The notations complained of in the instant case do not provide "a neat condensation of the government's case against the defendant." The notations merely repeat facts which had already been received in evidence; facts that were conceded by all. United States v. *Ware,* * * * [247 F.2d 698 (C.A. 7)] and *Sanchez* v. *United States,* 393 F.2d 260 (8th Circuit, 1961) stand for the principal [*sic*] that a conviction must be reversed if the overall result is the government's witnesses are in effect accompanying the jurors in the jury room. Clearly that was not the net effect in this case * * * .
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> "Considerable discretion in sending exhibits to the jury must be granted the trial court. Probative value of evidence admitted must be weighed against possible prejudice that may result if the exhibits are sent to the jury. The trial judge who has heard the evidence and observed at first hand the issues

[4]We are lodging copies of the reports with the Clerk of this Court.

> as they developed during the trial can best determine whether exhibits should be received and sent to the jury. We should not interfere unless there is a clear abuse of discretion."[5]

4. Petitioner claims that the court's failure to instruct the jury that their verdict must be unanimous constituted plain error. Petitioner never tendered such an instruction, nor objected to the court's failure to give it, nor asked that the jury be polled following the return of its verdict. Moreover, the verdict was signed by all twelve jurors. In these circumstances the court of appeals correctly concluded (Pet. App. A-10) that any error that existed because of the absence of an instruction on unanimity was harmless.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[5]Petitioner's reliance on *United States* v. *Frattini,* 501 F.2d 1234 (C.A. 2), is misplaced, since in that case there was no claim of entrapment; rather, the defendant asserted that no narcotics transaction had occurred at all, and the contested exhibit contained evidence not already admitted and, as the court found, inadmissible